IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.16 OF 2006

IN

SUIT NO.17 OF 2003

IN

PETITION NO.4 OF 2003

Mr.Raghuvansh Dewanchand Bhasin ...
Plaintiff/orig.petitioner.

vs.

Ms.Sonia Ramkumar Kapur ...Defendant/orig.Caveator.

And

Sunil Ramkumar Kapur ...Applicant.

Plaintiff/Original Petitioner in person present.

Mr.Sanjay Jain i/b. L.J.Law, for Applicant

CORAM: D.K.DESHMUKH,J.

DATED: 7th July, 2006.

P.C.:-

1. This is a notice of motion taken by the Applicant Sunil Kapoor, basically for setting aside the order dated 6.11.2003 passed by

this Court in Chamber summons no.474 of 2003.

2. The facts that are material and relevant for deciding this Notice of Motion are that the original plaintiff Mr.Raghuvansh Dewanchand Bhasin has filed petition no.4 of 2003 in this Court for getting probate of the Will and Codicil left behind by one Ram Kumar Kapoor who died on 2.10.1998. The admitted position is that the present applicant Mr.Sunil Kapoor is son of the testator and one Ms.Sonia Kapoor was the daughter of the testator. According to Mr.Bhasin in the petition both the children of the testator viz. Sunil and Sonia were cited, they were served with the citation. It may be pointed out here that the present applicant Mr.Sunil has disputed the position that he was served with the citation in that probate petition. But that question is not relevant for deciding this notice of motion. The fact remains that Ms.Sonia was served with the citation and she had filed Caveat in the probate petition. The original plaintiff Mr.Raghuvansh Bhasin thereafter took out a chamber summons no.474 of 2003 for dismissing the Caveat dated 24.3.2003 filed by Ms.Sonia in the probate petition and also the affidavit filed by her in support of the Caveat. In that chamber summons, Ms.Sonia was appearing in person. It appears that the matter was fixed before the Court on 6.11.2003. On that date Ms.Sonia was absent, she had not filed any reply to the chamber summons. Therefore, the Court allowed

the chamber summons and the Caveat filed by Ms.Sonia was dismissed. The present notice of motion has been taken out for setting aside the order dated 6.11.2003. As a result of dismissal of Caveat filed by Ms.Sonia, which was the only caveat filed in the probate petition, the probate was granted in favour of Mr.Raghuvansh D. Bhasin of the Will of the testator on 29.11.2003. Ms.Sonia expired on 1.3.2004. It is thereafter that this notice of motion has been taken out by her brother who claims to be the sole surviving heir of Ms.Sonia, for condonation of delay in taking out the notice of motion and for setting aside the order passed on 6.11.2003.

2. The learned Counsel appearing for applicant in this notice of motion submits that this Court was not justified in passing the order on the chamber summons dated 6.11.2002 in the absence of deceased Sonia. The learned Counsel submits that as it is noted in the order dated 6.11.2003 that last time before 6.11.2003 when the chamber summons was fixed before the Court, the date was 26.6.2003. On that date Mr.R.D.Bhasin and Ms.Sonia both were present and the matter was adjourned for three weeks as a last chance. The matter was not listed before the Court after three weeks as directed by order dated 26.6.2003. The matter was, instead, listed on 6.11.2003. In the submission of the learned Counsel therefore, in accordance with the original side Rules and the consistent practice followed by this Court

whenever party is appearing in person and the case is listed suddenly, the Court issues notice to the party who is appearing in the Court in person indicating the date on which the Court is likely to hear the matter. According to the applicant, order dated 6.11.2003 was passed without issuing any notice to Ms.Sonia. The learned Counsel's next submission is that Mr.R.D.Bhasin is advocate by profession, when the order dated 6.11.2003 was passed, Mr.Bhasin was appearing in person. According to the learned Counsel as Mr.Bhasin is a practicing advocate though in that case he was appearing as litigant, he was under a duty to inform the Court true facts in relation to the defendant Ms.Sonia, before the Court made the order adverse to the interest of Ms.Sonia. The learned Counsel submits that in the petition no.4 of 2003 which was filed by Mr.Bhasin, Mr.J.Menon who described himself as registered judicial clerk of Advocate Mr.Bhasin has filed an affidavit dated 8.4.2003, wherein Mr.Menon the clerk of Mr.Bhasin has stated that when he went to effect service of the documents upon Ms.Sonia, the Watchman of the building where she had her flat, told him that she was mad woman and she is a drug addict and she is living a very sorry life. The learned Counsel further submits that Mr.Bhasin himself has filed an affidavit in the Testamentary Suit no.4 of 2003. In that petition, he had referred to the affidavit filed by Mr.Sunil Kapoor before the Delhi High Court wherein the applicant Sunil Kapoor had stated that Ms.Sonia has been paranoid and has been in unstable state of mind.

The learned Counsel submits that the affidavit which is referred to by Mr.Bhasin in his affidavit is the affidavit of the applicant Sunil Kapoor dated 13.8.1999. In paragraph 7 of that affidavit the applicant has stated that his sister Ms.Sonia for reasons of family circumstances is almost in a paranoid state. The learned Counsel pointed out that on this affidavit Mr.Bhasin has also signed as an advocate identifying the deponent. The learned Counsel then referred to a notice dated 18.1.2002 given by Mr.Bhasin as an Advocate representing the applicant Sunil Kapoor. In that letter it is stated that Ms.Sonia Kapoor does not exist. She is unmarried and is presently in a very bad state of mental health. Thus, according to the learned Counsel minimum that can be said is that Mr.Bhasin on 26.11.2003 knew, as has been informed by his clerk, that Ms.Sonia is a person of unsound mind and that her brother has stated on affidavit that she is suffering from paranoia. According to the learned Counsel considering the high moral standard of the profession to which Mr.Bhasin belongs he was under a duty to inform the Court these facts which were within his knowledge. The conduct of Mr.Bhasin of withholding those facts from the Court makes the order passed by the Court, in favour of Mr.Bhasin, infirm and therefore, is liable to be set aside.

3. In reply it is submitted by Mr.Bhasin that he was under no duty to inform the Court as contended on behalf the applicant.

According to him, Ms.Sonia was of sound mind, she had filed caveat, she had also filed affidavit in the Court, and therefore, according to him as he was of the opinion that she was of sound mind, it was not necessary for him to inform the Court what is the opinion of others about Ms.Sonia. He further submits that if he had interrupted the Court when the Court was passing the order on 6.11.2003 and told the Court that the order should not be passed because in the opinion of some persons Ms.Sonia is a person of unsound mind then his conduct of interrupting the Court would have amounted to contempt of the Court and therefore, according to him, he was under no duty to inform the Court what is the opinion of others about Sonia. He submits that what is stated in the affidavit of his clerk is meaningless, and what is stated in the notice which he wrote on behalf of the applicant and the affidavit filed by the applicant was the opinion of the applicant and he merely represented the applicant and wrote on the instructions from the applicant. He also submits that he did not know the members of the family of the testator though he knew that the testator had left behind him a daughter and a son. The original plaintiff also submits that there is inordinate delay in taking out this notice of motion and that delay has not at all been explained by the applicant. According to the original plaintiff, there is no reason for this Court to condone the delay. He also submits that the applicant has not placed any document on record to show that he is a legal representative of the

deceased Sonia. Therefore, according to the original plaintiff, the delay involved in taking out this notice of motion should not be condoned and the notice of motion at the instance of the applicant should not be entertained. He also relies on the judgment of the learned Single Judge of this Court in the matter of the "Will of Pitamber Girdhar. Soorji Jivandas (Petitioner), dated 27th July,1881, 5 Bom.638" and submits that as the applicant was cited in the probate, he was served with the probate petition but he did not appear and therefore, the present notice of motion which has been taken out by the applicant should not be entertained.

4. In the light of these rival submissions if the record is perused, it becomes clear that the chamber summons no.474 of 2003 was taken out by the original plaintiff for setting aside the Caveat dated 24.3.2003. The Caveat filed by Ms.Sonia in relation to which the order in the chamber summons was passed, is the only caveat filed in the petition. Therefore, the order dismissing the Caveat had drastic consequences namely the petitioner would automatically become entitled to the probate of the Will. Perusal of the record shows that the chamber summons was first placed before the Court on 9.4.2003. The Court directed that the matter should be placed on board on 16.4.2003. The next order is of 28.4.2003. It shows that on that date the matter was mentioned as it was not on board and the matter was directed to

be placed on board on 30.4.2003. From the order sheet it appears that the matter was not on board on 30.4.2003, instead it appeared on board on 26.6.2003. On 26.6.2003 when the matter was called, Mr.R.D.Bhasin was present and the respondent Ms.Sonia Kapoor was also present in the Court. The matter was adjourned for three weeks as last chance. From the record, it appears that the matter was not on board after three weeks from 26.6.2003. The matter thereafter was listed on 6.11.2003. The consistent practice followed by this Court whenever parties are appearing in person is that if the matter is appearing on board not on the nominated date but on some other date the Court directs the office to issue a notice to the party appearing in person intimating the date on which the Court is likely to take the matter. In this case, it appears from the record that no notice was issued to deceased Sonia and the matter was listed on 6.11.2003, and because she was not present and she did not file any reply, the chamber summons was granted. In my opinion, there are material irregularities in observing the procedure in making the order dated 6.11.2003. Therefore, really speaking for this sole reason the order is liable to be set aside. In any case, the order passed on the chamber summons is not the order passed on merit but has been passed because Ms.Sonia did not file her reply and did not remain present. As observed above the order has drastic consequences. It is a settled law that when a Court finds that the order having drastic consequences has

been made without contest, the Court leans in favour of allowing contest so that the persons involved get an opportunity to put forth their case on merits.

5. So far as the aspect of delay in taking out this notice of motion is concerned, this notice of motion has been taken out by the brother of the deceased respondent claiming to be heir of the deceased respondent. He claims that he came to know of the order only in April,2005 when he went through the proceedings of the Writ Petition filed before the Delhi High Court. Thereafter, he collected information and took search of the proceedings. Thereafter, he came to know of the order passed on the chamber summons and he took out this notice of motion immediately for setting aside the order. According to the original plaintiff, this is not the explanation for the delay. According to the original plaintiff, the present applicant was always aware of the pendency of the present proceedings and therefore, this cannot be termed as explanation for condonation of delay. The settled law in so far as the power of the Court of condoning delay is concerned is that the power of the Court to condone delay has to be used by the Court for advancing justice. The applicant claims to be a legal representative of the deceased. He claims that he was not aware of the proceedings. In my opinion, though the explanation for the delay given by the applicant cannot be termed as full proof,

nevertheless in the facts and circumstances of this case, in my opinion, it can be accepted as showing sufficient cause for condonation of delay.

6. One of the important aspect of the matter, in my opinion, why this Court has to set aside the order passed in the chamber summons is that the original plaintiff has failed to disclose to the Court the relevant facts which were within his knowledge. In my opinion, as an Advocate/litigant, it was his duty to inform the Court when the Court was proposing to make the order on the chamber summons, though in his opinion Ms.Sonia is a person of sound mind, that his own clerk has filed the affidavit in the probate petition wherein he has stated thus:-

> "I, Mr.J.Menon a registered judicial clerk of Advocate Mr.R.V.Bhasin who is also the above named petitioner, do hereby solemnly affirmed and state that :- ---------- I was told by the watchman that she invariably leaves at about 6.00 A.M. Everyday and may or may not return on most days. Today by way of exception, she happened to come to the building at about 2.00 PM. Generally she comes in the late hours after 12.00 PM. She was described by the watchman as a MAD woman. On my further enquiries including with her brother now residing at Andheri, I was told that she is a drug addict and is leading a very sorry life. Even I have

> seen her in that state of obvious appearance on 5.4.2003."

In testamentary petition no.4 of 2003, the original plaintiff Mr.Bhasin has filed an affidavit dated 31.3.2003. In paragraph 4 of that petition, Mr.Bhasin has stated thus:-

> "In course of the writ petition proceedings pending in Delhi High Court, son of Late Mr.Ram Kumar Kapur i.e. Sunil Kapur also filed his own independent affidavit a copy of which is also annexed as Exh.B. In this affidavit, Mr.Sunil Kapur has declared that his sister who is the respondent above has been paranoid or has been in an unstable state of mind, which fact should be specially taken note of. "

The affidavit of Mr.Sunil Kapoor to which the reference is made in the above quoted statement of the original plaintiff, is the affidavit dated 13.8.1999. In paragraph 7 of that affidavit he has stated thus:-

> "My sister too for reasons of family circumstances is almost in a paranoid state"

What is pertinent to note here is that Mr.Bhasin in his affidavit dated 31.3.2003 attributed to Mr.Sunil's a statement that his sister is of unstable state of mind, but perusal of the affidavit dated 13.8.1999 of Mr.Sunil Kapoor shows that he has not made any such statement in his affidavit. It means that the statement in the affidavit of Mr.Bhasin dated 31.3.2003 that Ms.Sonia is of unstable state of mind is of his own

deduction and not the statement made by Mr.Sunil Kapoor. The applicant alongwith his affidavit in support of notice of motion has filed copy of the letter dated 18.1.2002. Perusal of that notice shows that the notice has been issued to Shri.D.S.Paavariya, Additional District Judge, District Court, Tis Hazari, New Delhi by the original plaintiff Mr.Bhasin on behalf of the applicant Mr.Sunil Kapoor. In that letter, it is stated thus:-

> "In addition another alleged heir i.e. daughter Mrs.Sonia Kapoor does not exist. Ms.Sonia Kapoor is unmarried and is presently in a very bad state of mental health. None is able to reach her."

The explanation of the original plaintiff in relation to the statements made in this letter is that he has made those statements on instructions from Mr.Sunil Kapoor though he himself did not believe in those statements. The original plaintiff has also stated before me that he did not know Ms.Sonia and the other members of the family of the testator, though in the Will the testator describes Mr.Bhasin as a friend, bequeathing his estate to him. It is also on record that Mr.Bhasin was acting as constituted attorney of the deceased and was also acting as a lawyer for Mr.Sunil Kapoor, therefore, it is hard to believe that Mr.Bhasin did not know the members of the family of the testator. If Mr.Bhasin knew that Ms.Sonia is not of unsound mind then as a lawyer he should not have agreed to make such a statement in the

letter which he had issued on behalf of Mr.Sunil Kapoor and that if he was told that by Mr.Sunil and therefore he had made the statement, then it was his duty to inform the Court also. The profession of Law is a noble profession. The members of this profession are to be judged by very high standard Even when a lawyer is a litigant he continues to be under the same duty to observe high standard in the Court. The lawyer even when he is not appearing as a lawyer, as a member of society he must observe high standard. In my opinion, therefore, it was the duty of Mr.Bhasin to appraise the Court of the above said facts before the Court made the order in his favour and against Ms.Sonia only because she was absent. Had Mr.Bhasin, at that time pointed out to the Court, that, though he does not believe, to his knowledge Ms.Sonia has been described as a person of unsound mind by different people, the Court would not have proceeded to make the order against Ms.Sonia, because she was absent, instead minimum that the Court would have done would have been to give directions to the office to issue notice to her intimating the next date. In my opinion, Mr.Bhasin was aware of this and therefore, in order to obtain from the Court an order in his favour, without any contest, he suppressed the information from the Court. I do not find any force in his submission that at that point of time when the Court was passing the order if he had interrupted the Court and had informed the Court that the Court should take into consideration these facts and then make an

appropriate order then it would have amounted to contempt of Court. In my opinion, the Court would have welcomed such a move because it would be a fair interruption which would have been expected from every lawyer. It appears that the original plaintiff Mr.Bhasin suppressed from the Court deliberately the material and relevant facts in order to obtain favourable order. After having gone through the record, I put it to Mr.Bhasin that as a lawyer he should voluntarily agree to have the matter contested instead of resting on uncontested order. But he refused to accept the suggestion and instead argued the matter on merit. I made suggestion not because I did not want to decide the matter on merit, but I wanted if possible to avoid making observations against a person who is a lawyer by profession. The Court while exercising jurisdiction under Indian Succession Act exercises discretion according to the justice and equity. In my opinion, therefore, when independently of any notice of motion being moved, the Court is made aware of the circumstances in which an order adverse to the interest of a person who may be a person of unsound mind has been made in disregard to the duties imposed on the advocate, it would be the duty of the Court to interfere and say that such order should be removed and parties should be allowed to contest the matter on merit. For all these reasons, therefore, the notice of motion is granted in terms of prayer clause (a) and (b). The original plaintiff is directed to pay cost of this notice of motion to the applicant.

The cost is quantified at Rs.25,000/-.